

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GARY J.D.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C22-1821-BAT

**ORDER REVERSING THE
COMMISSIONER'S FINAL DECISION**

Plaintiff seeks review of the denial of his application for Disability Insurance Benefits. He contends the ALJ misevaluated the medical opinion evidence, his testimony, and the testimony of his mother. Dkt. 15 at 1. For the reasons, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is currently forty-nine years-old, has a high school education, and previously worked as a motor vehicle dispatcher and as a shipping and receiving supervisor. Tr. 32. On December 12, 2018, he applied for benefits, alleging disability beginning August 16, 2016. Tr. 372-73. His application was denied initially and on reconsideration. Tr. 190-200, 203-20. The ALJ conducted a hearing on March 16, 2021, and a supplemental hearing on July 1, 2020, at

1 which a medical expert testified. The ALJ subsequently found Plaintiff not disabled on
2 December 21, 2021. Tr. 17-34, 119-61, 162-80. As the Appeals Council denied Plaintiff's
3 request for review, the ALJ's decision is the Commissioner's final decision. Tr. 1-7.

4 DISCUSSION

5 A. Plaintiff's Testimony

6 Plaintiff contends the ALJ misevaluated his testimony regarding his physical impairments
7 and pain. At the March 2021 hearing, Plaintiff testified he was injured at work in August 2014,
8 and while he intermittently went back to work on modified, light duty for nearly two years after
9 the accident, he could not work at all beginning in August 2016. Tr. 127. At the time he
10 testified, Plaintiff had already undergone multiple spinal surgeries, including two fusions, and he
11 asserted his physicians had exhausted all of the treatment possible for his back. Tr. 136-37; *see*
12 *also* Tr. 596, 1958. In addition to his back impairments, Plaintiff also suffered from hip and
13 groin pain as a result of a labral tear, damage to the bone, and arthritis. Tr. 137-38. After the
14 hearing, in July 2021, Plaintiff had surgery to replace his hip. Tr. 3214.

15 Plaintiff testified he cannot work full-time due to the radiating pain in his low back and
16 left leg, occasional falls, and the need for medication that makes it "hard to focus and concentrate
17 on just daily activities, normal tasks." Tr. 136. He stated his medication affected his mood and
18 caused forgetfulness and lethargy. Tr. 137.

19 Plaintiff testified he can only drive up to ten miles due to pain, and he drives
20 approximately every other day. Tr. 132. Plaintiff can take care of his bills, check email, and
21 play games on his phone. Tr. 133. His hobbies included drumming and riding motorcycles, but
22 both "were very limited now." Tr. 133. Plaintiff can shower with modifications. Tr. 153.

1 Plaintiff also testified that prior to his September 30, 2020, date last insured (“DLI”), he
2 could walk approximately five minutes before needing to rest, and he could sit and/or stand for
3 approximately thirty minutes. Tr. 146-47. Plaintiff’s pain requires him to lie down for
4 approximately one hour per day. Tr. 151. He stated he does not typically use a cane, but will
5 use one “at times,” and if he goes to the grocery store, he always uses a cart “just for stability.”
6 Tr. 145, 151. Plaintiff asserted a bag of groceries would have been the heaviest item he could lift
7 prior to his DLI. He additionally testified his roommate does the cleaning, takes out the garbage,
8 and cares for the lawn. Tr. 149.

9 Regarding Plaintiff’s physical impairments, the ALJ found at step two Plaintiff’s
10 degenerative disc disease of the lumbar spine and cervical spine, status post-two fusions with
11 radiculopathy, chronic obstructive pulmonary disease/asthma, hernias, and bilateral hip
12 degenerative joint disease are severe impairments.¹ Tr. 19. The ALJ subsequently found
13 Plaintiff presented objective medical evidence establishing generally that his medically
14 determinable impairments could cause the symptoms alleged, and no affirmative evidence of
15 malingering. Tr. 24. The ALJ was thus required to provide “specific, clear and convincing
16 reasons” for rejecting Plaintiff’s testimony concerning the intensity, persistence, and limiting
17 effects of his symptoms. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting
18 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)); accord *Smartt v. Kijakazi*, 53 F.4th 489,
19 499 (9th Cir. 2022) (confirming that the “clear and convincing” standard continues to apply).

20 In discounting Plaintiff’s testimony, the ALJ reasoned Plaintiff’s function improved
21 “through surgical intervention and rehabilitation,” treatment which the ALJ subsequently labeled
22

23 ¹ The ALJ also found several severe mental impairments, but Plaintiff has not challenged any of
the ALJ’s findings regarding his mental impairments.

1 as both “effective” and “conservative.” Tr. 24, 26. In support, the ALJ summarized the medical
 2 evidence regarding Plaintiff’s treatment for his back impairments during the relevant period, and
 3 found the examination notes demonstrated Plaintiff “had functional use of his upper and lower
 4 extremities.”² Tr. 24-27 (citing Tr. 1343-44, 1202-04, 1725-50, 3073, 1585, 1622-29, 1196-97,
 5 1733, 648-49, 1047-49, 1133, 1095, 739, 744, 916, 934, 805, 808, 2262, 1089, 1754, 1756, 2040,
 6 2048, 2116, 2601-02, 2137-38, 2168-72, 3052-53). Plaintiff argues the ALJ erred regarding all
 7 of the proffered reasons. Dkt. 15 at 4.

11 ² Many, if not a majority, of the ALJ’s most critical citations to the record are incorrect. *See* Tr.
 12 24-27. Those include the record citations provided by the ALJ in her summary of the evidence,
 13 which she contends demonstrate Plaintiff’s improvement and inconsistencies supporting the
 14 ALJ’s discounting of Plaintiff’s testimony and multiple medical opinions. However, many of the
 15 record citations do not support the propositions for which the ALJ has cited them, because the
 16 ALJ has miscited the exhibit number. Tr. 24-27. For example, the ALJ included multiple
 17 citations to exhibit “13F,” which consists of a five-page psychiatric opinion, when the ALJ
 18 appears to have intended, with the nearly ten citations to “13F,” to cite to exhibit 12F, Tr. 1040-
 19 1223, which itself includes nearly two hundred pages of progress notes regarding the treatment
 20 for Plaintiff’s back impairments. *See* Tr. 25-26. There are additional record citation errors that
 21 make it difficult for the Court to ascertain the medical records to which the ALJ intended to cite.
 22 *See* Tr. 26 (citing to exhibit 27F at page 5, when exhibit 27F, Tr. 2135-36, consists of two
 23 pages); Tr. 25 (erroneously citing to exhibit 16 at page 149, Tr. 1585, for Plaintiff’s November
 2016 discharge from physical therapy, when it appears that ALJ intended to cite to exhibit 15F at
 page 149, Tr. 1436); Tr. 25 (erroneously citing to Exhibit 17F, when it appears the ALJ intended
 to cite exhibit 16F). While the Commissioner appears to have realized the ALJ’s errors and, in
 many places in her opposition brief, has likely made accurate assumptions regarding the ALJ’s
 intended citations, the Commissioner did not acknowledge or flag for the Court the ALJ’s
 citation errors – thus, adding to the confusion. *See, e.g.*, Dkt. 21 at 4 (assuming without
 explanation that ALJ intended citation to exhibit “16F149” (Tr. 1586) at Tr. 25 to be to
 “15F149,” or Tr. 1436); Dkt. 21 at 5 (assuming without explanation that ALJ intended citations
 to “13F56” and “13F94” at Tr. 26 to instead be to exhibit 12F (Tr. 1095, 1033)); Dkt. 21 at 5
 (assuming without explanation that ALJ intended citations to “17F19-26” at Tr. 25 to instead be
 to exhibit 16F (Tr. 1457)). Utilizing the parties’ briefs and the index to the administrative record,
 the Court has attempted to ascertain the records to which the ALJ intended to cite. However,
 that was not always possible, and the Court declines to play detective or mind reader regarding
 the ALJ’s additional ambiguous miscitations.

1 **1. Findings Regarding Improvement and Effective Treatment**

2 Plaintiff argues the medical evidence, including the records cited by the ALJ, failed to
3 show improvement with his back impairments. Dkt. 15 at 5 (citing Tr. 1096, 595, 600, 603-04,
4 621-22, 1751, 2003, 2010, 2027). In support, Plaintiff cites to: (1) September 2018 emergency
5 room records, at which time he tested positive during straight leg raises and had an MRI done,
6 that revealed “severe spinal canal stenosis” of his thoracic spine and moderate spinal canal and
7 neuroforaminal stenosis of his lumbar spine, Tr. 604-05, 595-606; (2) an August 2019
8 electromyography (“EMG”), Tr. 1751; (3) June 2020 treatment notes from Physician’s Assistant
9 (“PA”) Patrick Czaplicki and MRIs that confirm lumbar disc herniation with radiculopathy, Tr.
10 2010; and (4) Dr. Hatzakis’ June 2020 treatment notes observing “a very abnormal low back
11 examination,” and hip arthropathy and impingement. Tr. 2027.

12 Plaintiff further contends any improvement he experienced does not mean he can sustain
13 work, and he asserts the ALJ failed to specify when his improvement to the point of full-time
14 work occurred. Dkt. 15 at 4. Plaintiff argues in order to find he had improved to the point
15 where he could return to work, the ALJ needed to find he improved within twelve months of his
16 August 2016 onset date. Dkt. 15 at 4. Plaintiff additionally argues the Commissioner
17 mischaracterizes the records to which the ALJ cited as “unremarkable” and “largely normal”
18 when in fact they demonstrated objective abnormalities and/or were irrelevant. Dkt. 22 at 7
19 (citing Tr. 1133, 1733-34, 171, 173); *see* Tr. 171, 173 (medical expert Dr. Schmitter testifies that
20 Plaintiff’s strength deficiencies as documented in physicians’ medical records were
21 “significant”).

22 Finally, Plaintiff argues the ALJ failed to consider his hip impairment in conjunction with
23 the finding of improvement. Dkt. 15 at 6.

1 The Commissioner counters Plaintiff's discharge from physical therapy in November
2 2016, his successful completion of a pain management program in fall 2016, and the results of
3 Plaintiff's 2017 lumbar decompression surgery, support the ALJ's improvement findings. Dkt.
4 21 at 4-5 (citing Tr. 25-26, Tr. 1436, 1457, 648, 1095, 1133). The Commissioner, however, fails
5 to address Plaintiff's argument regarding the timing and duration of any improvement. In terms
6 of Plaintiff's examination records, the Commissioner cites to examination notes from May and
7 December 2017, August 2018, November and December 2018, and November 2020, along with
8 emergency room records from December 2018, in arguing that the ALJ reasonably found
9 Plaintiff's testimony inconsistent with examination notes. Dkt. 21 at 3-4 (citing Tr. 1733, 1133,
10 1095, 739, 934, 2602).

11 The Commissioner further asserts the ALJ considered Plaintiff's hip impairment. Dkt. 21
12 at 5 (citing Tr. 24).

13 Having reviewed the longitudinal record, the Court finds the records cited by the ALJ and
14 by Plaintiff demonstrate, at best, Plaintiff experienced occasional improvement as to back
15 impairments and pain, but the improvement never lasted more than a few months at most –
16 including during the times following Plaintiff's discharge from physical therapy in 2016, the
17 completion of the pain management program in 2016, and his 2017 laminectomy, as advanced by
18 the Commissioner. *See, e.g.*, Tr. 1436, 1456-62, 2262, 1089, 1130, 604-05, 595-606, 1860,
19 1748, 1750, 1096. Indeed, following Plaintiff's completion of a Structured Intensive
20 Multidisciplinary Program ("SIMP") in 2019, at which point SIMP physicians opined that
21 Plaintiff's functional capacity had improved, Plaintiff nevertheless continued to experience back,
22 leg, hip, and groin pain, and was subsequently diagnosed in both 2020 and 2021 with chronic left
23

1 SI radiculopathy, left leg weakness, and sensory loss. *See* Tr. 3137, 2027, 2139-67, 2010, 2151-
2 43, 2161, 2137-38, 1751, 3134-36.

3 Similarly, contrary to the ALJ's findings otherwise, Plaintiff's examination findings –
4 including those in the records specifically cited by the ALJ – demonstrate fluctuations in the
5 functionality of his extremities. *See* Tr. 1436, 1733, 1095, 2262, 1089, 1456-58. Additionally,
6 the ALJ chose to cite to records regarding medical visits unrelated to Plaintiff's back and/or hip
7 impairments, including visits for swollen tonsils, asthma, ingrown toenails, insect bites, and
8 other pulmonary issues, Tr. 739, 744, 916, 934, 805, 806, 2040, 2048, 2116, while ignoring
9 many other more pertinent records contrary to the ALJ's findings, thus engaging in cherry-
10 picking when it came to the examination findings. *See, e.g.*, Tr. 604-05, 1614-16, 1751, 2027,
11 1732-40, 1748, 1750, 646, 1096, 1861, 3135, 1096, 3135-36, 2026-27, 2139-67, 2137-38, 1130.

12 Finally, the Court finds the ALJ failed to adequately consider the symptoms and pain
13 associated with Plaintiff's hip impairment or provide clear and convincing reasons for
14 discounting Plaintiff's related testimony. The ALJ did not articulate her evaluation of the hip
15 pain other than to note Plaintiff testified he suffered from it, and he did not specifically seek
16 treatment for his hip impairment until 2020. Tr. 24. However, as noted by treating Dr. Hatzakis,
17 Plaintiff regularly complained to numerous medical providers about groin pain from 2014-2020.
18 Tr. 2161. According to Dr. Hatzakis, Plaintiff's hip issues, which included labral capsular
19 degeneration and osteoarthritis, got "lost along the way" while Plaintiff was treated for his back
20 impairments. Tr. 2161 (Dr. Hatzakis notes that conclusion after "pouring" through Plaintiff's
21 medical records). Moreover, the medical expert, Dr. Schmitter, testified Plaintiff's hip
22 impairment, which necessitated hip replacement surgery, existed prior to Plaintiff's September
23 2020 DLI, and such impairments are "gradual." Tr. 180. Thus, Plaintiff's "delay" in seeking

1 hip-specific treatment until 2020, did not undermine his testimony, especially given he had been
2 complaining of the related pain for six years.

3 **2. Findings Regarding Conservative Nature of Treatment**

4 Plaintiff also argues his treatment during the relevant period from August 16, 2016,
5 through September 30, 2020, cannot be considered “conservative.” Dkt. 15 at 6. He notes
6 before his onset date, he had six surgeries on his lumbar spine, and his then-physician, Dr. Howe,
7 subsequently advised him no further surgeries would be helpful. Dkt. 15 at 6 (citing Tr. 1860,
8 1287). Plaintiff further notes following his onset date, in July 2017, another physician, Dr. Teng,
9 performed a revision lumbar laminectomy, decompression, and medial facetectomies, after
10 which his symptoms continued, and Dr. Teng advised him in 2018 that he had no further
11 treatment to offer Plaintiff. Dkt. 15 at 7 (citing Tr. 1734, 646, 1748, 1096, 1750). Additionally,
12 Plaintiff underwent a hip replacement just weeks after his July 2021 hearing to repair his pre-
13 DLI hip impairment. Tr. 3214. Plaintiff contends none of the above procedures or the additional
14 epidural steroid injections he received can be considered “conservative.” The Commissioner has
15 not addressed Plaintiff’s argument regarding the ALJ’s erroneous characterization of his
16 treatment as “conservative.” *See* Dkt. 21 at 2-7.

17 The Court agrees the ALJ erred in characterizing Plaintiff’s extensive, and often
18 intrusive, treatment as “conservative.” This is particularly true because Plaintiff was repeatedly
19 advised during the relevant period he was nearing or had already achieved “maximum medical
20 improvement” and that “further medical treatment [was] not indicated.” Tr. 1090, 3138; *see also*
21 Tr. 1750 (treating orthopedic surgeon, Dr. Teng, advises Plaintiff in 2017 that he “has nothing
22 left to offer,” and that further spine surgery could even worsen Plaintiff’s symptoms).

23 **3. Activities of Daily Living**

1 Finally, both Plaintiff and the Commissioner assume the ALJ found Plaintiff's activities
 2 of daily living undermined his testimony regarding his physical impairments, but that was not the
 3 case. *See* Dkt. 15 at 7-8; Dkt. 21 at 5; *see also* Tr. 28. Instead, in conjunction with the ALJ's
 4 evaluation of Plaintiff's testimony regarding his *mental* impairments, the ALJ noted that, in spite
 5 of his physical impairments, Plaintiff remained socially active and still enjoyed his motorcycle
 6 riding, driving by himself, and going on walks.³ Tr. 28. Because the ALJ did not rely upon
 7 Plaintiff's ADLs as a reason to discount his physical impairment and symptom testimony, neither
 8 can the Court.

9 For these reasons, the ALJ failed to offer clear and convincing reasons supported by
 10 substantial evidence to reject Plaintiff's pain and symptom testimony regarding his physical
 11 impairments.

12 **B. Medical Opinion Evidence**

13 At the time of her decision, the ALJ had twelve medical opinions regarding Plaintiff's
 14 physical impairments, including many from Plaintiff's treating and examining physicians, one
 15 from a testifying medical expert ("ME"), and two from non-examining consulting state agency
 16 physicians. The ALJ considered eleven of those opinions and found most of the opinions
 17 "partially persuasive," but found the opinions from two of Plaintiff's treating physicians, Drs.
 18 Kroll and Hatzakis, were unpersuasive and the opinions from state agency physicians, Drs.
 19 Fitterer and Platter, on initial review and reconsideration, were persuasive.⁴ Tr. 28-33. The ALJ
 20

21 ³ In support, the ALJ noted that "despite allegations of significant back and hip pain that
 22 precluded sitting, [Plaintiff] still enjoyed motorcycle riding, driving by himself, or going for
 23 walks for recreation." Tr. 28 (citing Tr. 2016, Dr. Oscar Benitez's June 2020 psychological
 evaluation).

⁴ The ALJ failed to consider a May 2019 medical opinion regarding Plaintiff's functional
 capacity from the SIMP team, an issue that is addressed below.

1 adopted an RFC for the relevant period that mirrored state agency physician Dr. Platter's
2 opinion, providing as follows:

3 [Plaintiff] was able to stand and/or walk four out of eight hours. He could never
4 climb ladders, ropes, or scaffolds and could occasionally climb ramps and stairs. He
5 could occasionally balance, stoop, kneel, crouch, or crawl. He could frequently
6 reach in front and laterally with the right upper extremity and occasionally reach
overhead with the right upper extremity. He would need to avoid concentrated
exposure to extremes of cold, vibration and hazards. . . . He could have no more
than even moderate exposure to fumes, odors, dusts, and gases.

7 Tr. 23; *cf.* Tr. 214-16 (Dr. Platter's RFC opinion).⁵

8 The applicable regulations require the ALJ to articulate the persuasiveness of each
9 medical opinion, specifically with respect to whether the opinions are supported and consistent
10 with the record. *See* 20 C.F.R. § 404.1520c(a)-(c). An ALJ's consistency and supportability
11 findings must be supported by substantial evidence. *See Woods v. Kijakazi*, 32 F.4th 785, 792
12 (9th Cir. 2022).

13 Plaintiff challenges the ALJ's evaluation of five medical opinions regarding his physical
14 impairments, including two opinions from the SIMP team, two opinions from treating physician,
15 Dr. Hatzakis, and an opinion from ME, Dr. Schmitter.

16 **1. SIMP Team Opinions**

17 Plaintiff participated in the six-week SIMP program from May 8, 2019, through July 8,
18 2019, with the goal of improving his functioning with physical, psychological, and occupational
19

20 ⁵ The ALJ erroneously found that Dr. Fitterer's opinion on initial review was identical to Dr.
21 Platter's opinion on reconsideration. Tr. 28 (attributing Dr. Platter's limitations to Dr. Fitterer);
22 *see also* Tr. 196-97 (Dr. Fitterer's opinion); Tr. 214-16 (Dr. Platter's opinion). That, however,
23 was not the case. Dr. Platter's opinion was more restrictive than Dr. Fitterer's opinion. Contrary
to Dr. Platter's opinion and the ALJ's RFC assessment, Dr. Fitterer opined that Plaintiff was able
to stand and/or walk for approximately six hours in an eight hour workday, and also opined that
Plaintiff could occasionally climb ladders, ropes, or scaffolds, and could frequently kneel,
crouch, crawl, and climb stairs, and that Plaintiff had no manipulative or environmental
limitations. Tr. 197.

1 therapy. Tr. 3134-42. On the physical side, Dr. Heather Kroll and certified disability
2 management specialist (“CDMS”), Tara Campbell (referred to as “the SIMP team”), cosigned an
3 October 2019 discharge summary following Plaintiff’s completion of the program.⁶ Tr. 3134-
4 41. The October 2019 discharge summary itself includes an opinion regarding Plaintiff’s
5 functional capacity as of May 2019, prior to his participation in the SIMP program. The report
6 states before beginning the SIMP program, Plaintiff’s functional capacity was for “less than
7 sedentary” work, but that following the program, Plaintiff possessed a functional capacity for
8 light work. Tr. 3137, 3138.

9 The SIMP team further opined as of September 24, 2019, Plaintiff could sit for four to six
10 hours per day for .75 hours at a time; stand for 1.5 to 2.5 hours per day for .50 hours at a time;
11 and walk for 1.5 to 2.5 hours per day for .50 hours at a time. Tr. 3142. The team opined
12 Plaintiff could lift twenty pounds occasionally, and two pounds frequently, and that he could
13 carry twenty-five pounds occasionally and five pounds frequently. Tr. 3142. The Team also
14 opined Plaintiff should “rarely” bend or stoop, crawl, or climb ladders. Tr. 3142.

15 The ALJ found the opinion to be partially persuasive, reasoning the examination and
16 findings were “mostly consistent” with the longitudinal record and claimant’s demonstrated
17 functioning throughout the record. Tr. 31. However, without citation to the record, the ALJ
18 found the Team’s lift and carry restrictions were “overly restrictive in light of the record,” which
19 the ALJ asserted “showed intact gait, strength, and ongoing findings within the functional
20 limits.” Tr. 31. The ALJ made no supportability findings, as discussed in more detail below.

21
22
23 ⁶ The report also included findings and opinions regarding Plaintiff’s psychological impairments,
and was also signed by psychologist, Dr. Sean Tollison. Tr. 3138-39, 3141. However, as noted,
Plaintiff has not challenged the ALJ’s decision as concerns his psychological impairments.

1 Plaintiff argues the ALJ failed to recognize the SIMP team in fact proffered two opinions
2 regarding his functional capacity: one when he started the program in May 2019, and a second
3 opinion in October 2019, following his discharge. Dkt. 15 at 10. As for the May 2019 opinion,
4 Plaintiff argues the opinion, which opined he was capable of less than sedentary work, supported
5 a finding of disability at least through May 2019. Dkt. 15 at 10.

6 As for the October 2019 opinion, Plaintiff argues the ALJ failed to discuss the
7 supportability factor, and the ALJ's consistency findings are erroneous. Dkt. 15 at 11-12.
8 Plaintiff accurately notes the ALJ failed to provide any record citations for her consistency
9 findings. Plaintiff, however, looks to the ALJ's earlier summary of the medical evidence in
10 conjunction with her evaluation of Plaintiff's testimony, and argues the October 2019 SIMP
11 opinion was consistent with post-opinion examinations. In support, Plaintiff cites to (1) medical
12 expert, Dr. Schmitter's testimony regarding Plaintiff's "orthopedic pathology," neurological
13 deficits, and decreased strength, muscle atrophy, and sensation, Tr. 170-173; (2) February 2017
14 examination records from Dr. Bulley, Tr. 1614-16; and (3) November 2017 examination records
15 from Dr. Teng, Tr. 1748. Plaintiff also argues his gait, as cited by the ALJ, was irrelevant to his
16 lifting and carrying capacity, and the ALJ did not offer any reasons for rejecting the SIMP
17 team's bending and stooping limitations. Dkt. 15 at 13; Dkt. 22 at 3.

18 The Commissioner argues the ALJ's failure to address the SIMP team's May 2019
19 opinion Plaintiff was capable of less than sedentary work was harmless because the opinion
20 described temporary limitations that lasted only five months, noting the SIMP team subsequently
21 found in October 2019, Plaintiff had improved to light work. Dkt. 21 at 11.

22 The Commissioner also argues the ALJ's consistency findings in fact constituted
23 supportability findings. Dkt. 21 at 12. As for consistency, the Commissioner contends the

1 evidence the ALJ cited in conjunction with Plaintiff's testimony supported her consistency
2 finding regarding the SIMP team's October 2019 opinion. The Commissioner, however, fails to
3 address Plaintiff's specific arguments regarding consistency. The Commissioner also fails to
4 respond to Plaintiff's argument regarding the SIMP team's opined postural limitations.

5 The ALJ's failure to consider the SIMP team's May 2019 opinion that Plaintiff was
6 capable of less than sedentary work cannot be considered harmless. In arguing this opinion was
7 "temporary," the Commissioner erroneously assumes Plaintiff's functional capacity for less than
8 sedentary work, as opined to by the SIMP team in May 2019, did not commence until the date of
9 that opinion in May 2019. That assumption, however, ignores the fact that, given Plaintiff's long
10 history of injuries and treatment, Plaintiff's less than sedentary RFC existed from his September
11 2016 onset date through the date of the SIMP team's May 2019 opinion and until Plaintiff's
12 completion of the SIMP program and the team's subsequent October 2019 opinion. Because the
13 ALJ did not consider the May 2019 opinion, she also failed to consider this issue. Remand is,
14 therefore, required for the ALJ to consider the SIMP team's May 2019 opinion.

15 As for the SIMP team's October 2019 opinion, the Commissioner erroneously attempts to
16 recast the ALJ's consistency findings as supportability findings. The Ninth Circuit has held
17 "supportability" and "consistency" are two distinct factors, and the ALJ should evaluate them as
18 such. *See Woods*, 32 F.4th at 793 & n.4 (concluding that an ALJ's statement that a medical
19 opinion was "'not supported by' the record" was not a supportability finding, but instead, in fact,
20 constituted a consistency finding, and holding that to "avoid confusion in future cases, ALJs
21 should endeavor to use these two terms of art – 'consistent' and 'supported' – with precision").
22 Regarding "supportability," the regulations provide "[t]he more relevant the objective medical
23 evidence and supporting explanations presented by a medical source are to support his or her

1 medical opinion(s) or prior administrative medical finding(s), the more persuasive the medical
2 opinions or prior administrative medical finding(s) will be.” 20 C.F.R. §§ 404.1520c(c)(1),
3 416.920c(c)(1). By contrast, regarding “consistency,” the regulations provide “[t]he more
4 consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence
5 from other medical sources and nonmedical sources in the claim, the more persuasive the
6 medical opinion(s) or prior administrative medical finding(s) will be.” 20 C.F.R. §§
7 404.1520c(c)(2), 416.920c(c)(2).

8 Here, in making her findings regarding the persuasiveness of the SIMP team’s October
9 2019 opinion, the ALJ compared the SIMP team’s opinion with the longitudinal record and the
10 findings therein regarding Plaintiff’s functioning, gait, and strength – as opposed to evaluating
11 the opinion in light of the SIMP team’s own supporting explanations, tests, and interviews. *See*
12 Tr. 31. This shows the ALJ made consistency findings and not supportability findings, as
13 defined by the controlling regulations.

14 The ALJ failed to make any supportability findings regarding either SIMP team opinion.
15 Nevertheless, the Court notes that under *Woods*, a finding the SIMP team’s opinion is
16 inconsistent with the longitudinal record, if supported by substantial evidence, would be a
17 sufficient basis for the ALJ to conclude the SIMP team’s opinion was unpersuasive. *See* 32
18 F.4th at 792-94 & n.4 (consistency and supportability constitute two distinct factors that should
19 be treated separately). Accordingly, the Court addresses below the ALJ’s consistency findings
20 regarding the SIMP team’s October 2019 opinion.

21 The ALJ did not provide any record citations in support of her consistency findings,
22 instead stating referring simply to her discussion of the evidence “outlined above.” Tr. 31. In
23 accordance with *Kaufmann v. Kijakazi*, the Court has reviewed “the ALJ’s full explanation”

1 regarding her physical impairments, including the summary of evidence and the ALJ's
 2 supporting record citations discussed in conjunction with Plaintiff's testimony earlier in the
 3 ALJ's decision.⁷ 32 F.4th 843, 851 (9th Cir. 2022); *see also* Tr. 25-27 (citing Tr. 1343-44,
 4 1202-04, 1725-50, 3073, 1585, 1622-29, 1196-97, 1733, 648-49, 1047-49, 1133, 1095, 739, 744,
 5 916, 934, 805, 808, 2262, 1089, 1754, 1756, 2040, 2048, 2116, 2601-02, 2137-38, 2168-72,
 6 3052-53).⁸

7 Again, like the ALJ's findings regarding Plaintiff's testimony, the ALJ's consistency
 8 findings regarding the SIMP team's October 2019 opinion are not supported by substantial
 9 evidence. First, none of the ALJ's record citations highlighted by the Commissioner pertained to
 10 treatment for Plaintiff's back impairments – in spite of the fact that there is extensive evidence of
 11 Plaintiff's treatment for his back impairments. *See* Tr. 744, 916, 934. 739. Instead, the cited
 12 records regarding Plaintiff's gait, coordination, and range of motion were all from visits for
 13 swollen tonsils, asthma, and respiratory issues, and were from one single month only –December
 14 2018 – during the relevant four-year period. Moreover, as discussed with Plaintiff's testimony,
 15 Plaintiff's examination findings, including those pertaining to his gait, coordination, and range of
 16 motion, fluctuated during the relevant period. *See, e.g.,* Tr. 1436, 1733, 1614-16, 2027, 1095,
 17 2262, 1089, 1456-58. Furthermore, as Plaintiff notes, the ALJ failed to adequately explain how
 18 select routine findings regarding Plaintiff's gait and coordination affected his lifting and carrying
 19

20 ⁷ To the extent the Commissioner suggests *Kaufmann* permits the Court to scrutinize the ALJ's
 21 decision for post hoc arguments, the Court, declines because this interpretation is not authorized
 22 under *Kaufmann* or any other Ninth Circuit authority. *See Makenzie M. v. Comm'r of Soc. Sec.*,
 23 No. C22-5013-BAT, 2022 WL 2817086, at *1 (W.D. Wash. July 19, 2022) (citing *Bray v.*
Comm'r of Social Sec. Admin., 554 F.3d 1219, 1225-26 (9th Cir. 2009)) (court reviews ALJ's
 decision “based on the reasoning and factual findings offered by the ALJ – not post hoc
 rationalizations that attempt to intuit what the adjudicator may have been thinking”).

⁸ As noted above in n.2, many problems exist with the ALJ's supporting record citations.

1 capacity or his ability to bend, stoop, crawl, and climb ladders, as opined to by the SIMP team.
2 Finally, the ALJ cherry-picked the records she cited, ignoring other medical evidence, including
3 additional, more extensive examinations by orthopedic specialists. *See, e.g.*, Tr. 170-73, 1614-
4 16, 1748-50, 2027.

5 For these reasons, the ALJ's consistency findings regarding the SIMP team's October
6 2019 opinion are not supported by substantial evidence. Remand is required for the ALJ to
7 consider in the first instance the SIMP team's May 2019 opinion that Plaintiff was capable of
8 less than sedentary work and to reconsider the SIMP team's October 2019 opinion.

9 **2. Medical Expert ("ME") Dr. Eric Schmitter's Opinion**

10 Several months after Plaintiff's initial hearing, in July 2021, the ALJ held a supplemental
11 hearing at which ME, Dr. Schmitter, testified as to whether Plaintiff's physical impairments met
12 and/or equaled the relevant Listings and regarding his opinion as to Plaintiff's functional
13 limitations. Tr. 162-89. Dr. Schmitter reviewed Plaintiff's medical record and noted it included
14 "quite a bit of orthopedic pathology." Tr. 170. The doctor testified based on his review of the
15 records regarding Plaintiff's multiple physical impairments, the most significant was Plaintiff's
16 back impairment. Tr. 171. However, Dr. Schmitter opined Plaintiff did not satisfy the relevant
17 listing because he did not sufficiently require an assistive device as defined by the Listings. Tr.
18 175.

19 Dr. Schmitter opined Plaintiff has the RFC to stand and walk approximately four hours
20 out of an eight hour day with breaks as needed. Tr. 176. In terms of carrying and lifting, Dr.
21 Schmitter stated Plaintiff would be able to lift twenty pounds occasionally and ten pounds
22 frequently. Regarding postural limitations, Dr. Schmitter opined Plaintiff should never climb
23 ropes, ladders, or scaffolds, but could perform other postures on an occasional basis. Tr. 176.

1 Dr. Schmitter also testified it was “obvious” that Plaintiff would need more breaks than a person
2 who did not have back impairments and that his condition may “lead to the need to take more
3 frequent breaks at unpredictable intervals.” Tr. 178. Dr. Schmitter testified this limitation would
4 apply even if Plaintiff had a sit/stand workstation. Tr. 179.

5 Dr. Schmitter additionally testified even though Plaintiff’s hip replacement surgery was
6 scheduled post-DLI in July 2021, Plaintiff’s hip osteoarthritis and degeneration would have
7 existed prior to his September 30, 2020, DLI. Tr. 180. However, Dr. Schmitter was unable to
8 opine based on the records that he reviewed whether Plaintiff’s hip impairment required
9 additional limitations prior to his DLI. Tr. 182-83.

10 The ALJ found Dr. Schmitter’s opinion was partially persuasive. Tr. 30. In terms of
11 supportability, the ALJ found Dr. Schmitter did not have the opportunity to review “the final
12 functional report from [Plaintiff’s] rehab providers.” Tr. 30 (citing exhibit 58F generally). As
13 for consistency, the ALJ accepted Dr. Schmitter’s RFC opinion except to find that to the extent
14 Dr. Schmitter opined Plaintiff needs breaks at will, this opinion was inconsistent with the
15 longitudinal record and Plaintiff’s functioning. Tr. 30 (citing Tr. 3166-70, 2040, 2048, 1756).

16 **a. Supportability Findings**

17 Regarding supportability, Plaintiff assumes the ALJ’s reference to “exhibit 58F” the
18 “final functional report from the claimant’s rehab providers” is a reference to the October 2019
19 SIMP discharge summary and report. Plaintiff notes, contrary to the ALJ’s statement otherwise,
20 Dr. Schmitter indeed reviewed the report. *See* AR 1754-61, 3134-41. The Commissioner does
21 not address this mistake. Dkt. 21 at 13-14.

22 Other than a general citation to exhibit 58F, which itself includes 104 pages, the ALJ
23 indeed failed to clarify the “final functional report” to which she referred. Tr. 30. The Court

1 notes exhibit 58F consists of 104 pages, many of which are not a “report” but instead appear to
2 primarily constitute records from the State of Washington Department of Labor and Industries.
3 *See* Tr. 3066-70. The Court nevertheless agrees with Plaintiff the report to which the ALJ
4 appears to reference is the SIMP team’s October 2019 discharge summary and opinion,
5 discussed above, and located at Tr. 3134-41 within Exhibit 58F.

6 Presumably, the ALJ assumed Dr. Schmitter did not review the SIMP team’s October
7 2019 opinion/report because exhibit 58F was not admitted into evidence at the time that Dr.
8 Schmitter testified. *See* Tr. 3134-42; *see also* Tr. 168 (admitting exhibits 1F through 56F at Dr.
9 Schmitter’s July 1, 2021 hearing). However, a duplicate of that report is contained in Exhibit
10 22F at Tr. 1754-61. The ALJ presumably overlooked the fact Exhibit 22F also contained the
11 SIMP report at issue, and, unlike exhibit 58F, was a part of the record Dr. Schmitter reviewed.
12 Dkt. 15 at 15 (Tr. 167-68, 363-64). Accordingly, Dr. Schmitter would have reviewed the final
13 report contained within exhibit 22F. *See* Tr. 168.

14 The Commissioner also argues the ALJ’s statement “Dr. Schmitter did not appear to have
15 a good grasp of the new listing criteria” additionally constituted a finding his opinion lacked
16 supportability. Dkt. 21 at 13-14. It is unclear the ALJ’s observation constituted a supportability
17 finding. However, the Court notes Plaintiff has not challenged the ALJ’s determination he does
18 not meet or equal the Listings; nor does he challenge the ALJ’s treatment of Dr. Schmitter’s
19 opinion that Plaintiff failed to satisfy Listing 1.15 because he did not require an assistive device.⁹

21 ⁹ During Dr. Schmitter’s testimony, the ALJ redirected Dr. Schmitter from Listing 1.18, which
22 pertains to a major dysfunction of a joint, to Listings 1.15 and 1.16, which concern disorders of
23 the skeletal spine. Tr. 171-72. After shifting his focus from Listing 1.18 to Listing 1.15, Dr.
Schmitter initially testified that he thought Plaintiff would meet the listing. Tr. 172. However,
immediately after, while testifying regarding Plaintiff’s satisfaction of each of the requisite four
criteria outlined in Listing 1.15, Dr. Schmitter noted that while Plaintiff satisfied three out of four

1 *See* Tr. 175. Instead, Plaintiff challenges the ALJ’s persuasiveness findings regarding Dr.
2 Schmitter’s testimony about Plaintiff’s need to take breaks. Thus, even to the extent the ALJ’s
3 above observation could be construed as a supportability finding, it was not a finding that was
4 pertinent to the ALJ’s evaluation of Dr. Schmitter’s opinion regarding Plaintiff’s need for breaks
5 at will – the opined limitation at issue on appeal.

6 For these reasons, the ALJ’s relevant supportability findings are not supported by
7 substantial evidence.

8 **b. Consistency Findings**

9 Plaintiff argues the ALJ failed to identify how and where Dr. Schmitter’s opinion
10 regarding Plaintiff’s need for breaks conflicted with the record and was therefore vague. Dkt. 15
11 at 14. Plaintiff also argues that none of the evidence cited by the ALJ in fact conflicted with Dr.
12 Schmitter’s testimony regarding Plaintiff’s need for breaks. The Commissioner counters the
13 SIMP report itself, along with other “unremarkable” examination findings, supported the ALJ’s
14 rejection of a need for breaks at will as opined to by Dr. Schmitter. Dkt. 21 at 14.

15 Unlike the SIMP opinions discussed, the ALJ provided several record citations in support
16 of her finding that Dr. Schmitter’s opinion was inconsistent with the record. *See* Tr. 30. (citing
17 Tr. 3166-70, 2040, 2048, 1756). However, none of the records cited by the ALJ – which include
18 visit records to a podiatrist for a toenail injury, a citation to the SIMP report itself, a copy of
19 Plaintiff’s resume, and the 2014 work report of accident – undermine Dr. Schmitter’s opinion
20 regarding Plaintiff’s potential need for additional breaks due to his back impairment symptoms
21 and pain. Nor has the ALJ adequately explained how those records – or any of the additional
22

23 _____
of the criteria, Plaintiff did not ultimately meet the listing requirements because he did not utilize
an ancillary device – including a wheeled walker or bilateral canes – as required by the listing.
Tr. 174-75.

1 records cited in her summary of evidence at Tr. 24-27 – contradicted Dr. Schmitter’s findings
2 regarding Plaintiff’s need for breaks.

3 Because neither the ALJ’s supportability nor her consistency findings were supported by
4 substantial evidence, remand is required for the ALJ to reconsider Dr. Schmitter’s opinion.

5 **3. Dr. Hatzakis’ Opinions**

6 On November 25, 2020, treating physician, Dr. Hatzakis, provided an opinion in response
7 to a request from Plaintiff’s vocational rehabilitation provider regarding Plaintiff’s ability to
8 perform several jobs, including receptionist and motor vehicle dispatcher. Tr. 525-42. Dr.
9 Hatzakis opined Plaintiff was permanently restricted from performing any of the jobs because he
10 was unable to sit for prolonged periods of time due to his “hip and low back pathology.” Tr.
11 531, 535, 542. Subsequently, in February 2021, Dr. Hatzakis opined that during the relevant
12 period, Plaintiff was able to lift and carry ten pounds occasionally and five pounds frequently.
13 Tr. 2693; Tr. 2698 (stating his RFC opinion was effective as of 2019). He also opined Plaintiff
14 was able to sit and/or stand approximately three hours per day, and Plaintiff would have needed
15 to shift positions every twenty minutes while sitting and every ten minutes while standing. Tr.
16 2693-94. Dr. Hatzakis further opined Plaintiff would needs to walk around for approximately
17 five to ten minutes after sitting, and that he needs the opportunity to shift at will due to his “left
18 SI radicular pain and left hip impingement pain.” Tr. 2694. Dr. Hatzakis also limited Plaintiff to
19 occasional pushing/pulling and indicated Plaintiff could only occasionally climb stairs but could
20 never twist, stoop, crouch, or climb ladders. Tr. 2695. The doctor opined Plaintiff’s physical
21 impairments and symptoms would have caused three or more absences per month. Tr. 2696.

22 The ALJ found Dr. Hatzakis’ opinions not persuasive. Tr. 31. First, the ALJ suggested
23 the opinions lacked supportability because Dr. Hatzakis began treating Plaintiff three months

1 prior to his DLI. Tr. 31. Additionally, the ALJ found most of Dr. Hatzakis' opined limitations
2 were based "largely on [Plaintiff's] self-reports." Tr. 31. The ALJ further found Dr. Hatzakis'
3 opinion regarding Plaintiff's absences was not supported by his own treatment records, which the
4 ALJ asserted did "not indicate this level of disruption." Tr. 32 (citing Tr. 2754-82, 2024-28,
5 2139-67). As for consistency, the ALJ found Dr. Hatzakis' opinions were not consistent with the
6 record "as a whole," and specifically, were inconsistent with the SIMP team function report. Tr.
7 31 (ALJ references "functional consultative examination, found at Exhibit 58").

8 **a. Supportability Findings**

9 Plaintiff argues Dr. Hatzakis's opinions are supported because he based his opinions
10 upon examinations, tests, MRIs, diagnostic injections, and medical evidence – and not just
11 Plaintiff's self-reports. Dkt. 15 at 15-16. Plaintiff additionally argues the timing of Dr.
12 Hatzakis' treatment does not undermine the supportability of his opinion. He further notes Dr.
13 Hatzakis reviewed his treatment records back to 2014.

14 Plaintiff additionally argues the ALJ erred in her characterization of Dr. Hatzakis'
15 treatment notes in conjunction with the ALJ's supportability findings. *See* Tr. 32 (ALJ's finding
16 that Dr. Hatzakis' treatment notes did not support the limitations to which he opined, and
17 citations to Dr. Hatzakis' notes in their entirety at Tr. 2754-82, 2024-28, 2139-67). Plaintiff
18 contends the ALJ misrepresented the very page of Dr. Hatzakis' June 2020 notes to which she
19 cites, emphasizing information that was of little relevance to Dr. Hatzakis' opinion. Dkt. 15 at
20 16 (discussing Tr. 2026, cited by the ALJ). Plaintiff also notes Dr. Hatzakis indeed performed a
21 hip replacement surgery after completing his opinions, which itself supports Dr. Hatzakis'
22 finding regarding "significant pathology in Plaintiff's hip." Dkt. 15 at 16.
23

1 The Commissioner argues Dr. Hatzakis did not cite to any abnormal physical
2 examination findings in his opinions, and therefore, his opinions must have been based on
3 Plaintiff's self-reports. Dkt. 21 at 15. Additionally, in an argument the Commissioner
4 mistakenly characterizes as a "consistency factor" argument, the Commissioner also argues the
5 ALJ's citations to Dr. Hatzakis' treatment records in fact render the opinion unsupportable. Dkt.
6 21 at 16 (citing Tr. 2026, 2141, 2048).¹⁰

7 Dr. Hatzakis began treating Plaintiff before his DLI for a condition that both Drs.
8 Hatzakis and Schmitter opined was a gradual condition, that very likely was caused by Plaintiff's
9 2014 work accident, but was overlooked by the more urgent need to treat his back impairments
10 and related pain and symptoms. Tr. 180, 2161. As noted by Dr. Hatzakis following his
11 extensive review of Plaintiff's medical records, Plaintiff began complaining of groin pain soon
12 after the 2014 accident, Tr. 2161, and such complaints are evident in the medical evidence of
13 record, including the records cited by Plaintiff. *See, e.g.*, Tr. 604-05, 1732-40, 1090-96. Given
14 these facts, the ALJ erred in finding Dr. Hatzakis' opinions, based on his treatment of Plaintiff in
15 2020-2021, and examinations, tests, and record review, was less supportable because he began
16 treating Plaintiff at the end of the relevant period but prior to his DLI.

17 Second, because Dr. Hatzakis' opinion was based on his own clinical observations,
18 testing and his extensive record review, in addition to Plaintiff's self-reports, the ALJ's related
19

20 ¹⁰ Again, as noted above, "supportability" and "consistency" are two distinct factors. *See Woods*,
21 32 F.4th at 793 & n.4. To the extent that the ALJ looked to Dr. Hatzakis' own treatment records
22 and examination findings in evaluating the persuasiveness of Dr. Hatzakis' opinions – as
23 opposed to other evidence and/or the longitudinal record – those findings constitute
supportability findings. *See* 20 C.F.R. §§ 404.1520(c)(1), 416.920(c)(1) (stating that, "[t]he
more relevant the objective medical evidence and supporting explanations presented by a
medical source are to support his or her medical opinion(s) or prior administrative medical
finding(s), the more persuasive the medical opinions or prior administrative medical finding(s)
will be").

1 supportability finding also was not supported by substantial evidence.¹¹ *See Allison G. v.*
2 *Comm'r of Soc. Sec.*, No. C20-5839-BAT, 2021 WL 3661449, at *1 (W.D. Wash. Aug. 18,
3 2021).

4 Furthermore, Dr. Hatzakis' opinion was supported by his own abnormal findings,
5 contrary to the Commissioner's argument. Dkt. 21 at 16 (citing duplicate records from Dr.
6 Hatzakis' June 2020 examination at Tr. 2026, 2141). The ALJ cited to Dr. Hatzakis'
7 examination on June 24, 2020, in support of her supportability finding. Tr. 32 (citing to Exh.
8 25F, Tr. 2024-28). While that particular examination included normal Romberg and Trendelen
9 test results, as noted by the ALJ, that very examination also documented Plaintiff's heel toe
10 walking "was abnormal," and "reveal[ed] pain in low back and focal pin on facet loading." Tr.
11 2024-28. Dr. Hatzakis himself subsequently characterized the June 2020 examination as "a very
12 abnormal low back examination," in his follow-up September 2020 examination notes. *See*
13 2147-48; *see also* Tr. 2151-56 (Dr. Hatzakis' later September 2020 examination notes describe
14 "hip pathology driving problems in left hip and right thigh"). In his February 2021 opinion, Dr.
15 Hatzakis offered additional medical findings and observations to support his opinion. Tr. 2695-
16 97.

17 For these reasons, the ALJ's supportability findings regarding Dr. Hatzakis' opinions are
18 not supported by substantial evidence.

19 **b. Consistency Findings**
20
21

22 ¹¹ At the time of Dr. Hatzakis' November 25, 2020, opinion regarding Plaintiff's ability to
23 perform certain vocations, Dr. Hatzakis had seen and examined Plaintiff five times from June
2020 through November 2020. *See* Tr. 2026-27, 2148, 2153-54, 2158-60, 2163-64.
Additionally, Dr. Hatzakis saw and examined Plaintiff on February 17, 2021, the very day that
he issued the February 2021 opinion. *See* Tr. 2688-99.

1 As for consistency, Plaintiff contends the ALJ failed to adequately explain how Dr.
2 Hatzakis' opinions were inconsistent with the "record as a whole" or with the SIMP team report
3 the ALJ cited. Dkt. 15 at 16-17. Plaintiff asserts Dr. Hatzakis' opinions are consistent with the
4 SIMP report, noting findings in the report that he suffered from impaired sensation, reduced
5 strength and muscle atrophy in his left foot, and diminished reflexes. *See* Tr. 3136.

6 In opposition, and as noted above, the Commissioner erroneously miscast several
7 supportability findings as consistency findings. Aside from that mischaracterization, regarding
8 consistency, the Commissioner suggests the Court look to other "unremarkable" examinations
9 discussed by the ALJ in her evaluation of *Dr. Schmitter's* opinion. *See* Dkt. 21 at 16 (citing Tr.
10 30). In support, the Commissioner cites to a page in the SIMP team's October 2019 report, in
11 which the SIMP team stated Plaintiff's "gait is nearly normal," and to Dr. Yan's September 2019
12 treatment notes from Plaintiff's follow-up visit for an August 2019 toenail removal, in which Dr.
13 Yan observes Plaintiff was, among other things, "comfortable" and in no acute distress, and
14 "neurologically grossly intact," with "no motor or sensation" defect. Dkt. 21 at 16 (citing Tr.
15 1756, 2048).

16 The Court rejects the Commissioner's argument. First, the Commissioner asks the Court
17 to create on its own findings that support the ALJ's largely vague consistency findings regarding
18 Dr. Hatzakis' opinions. Specifically, the Commissioner asks the Court to impute the reasons the
19 ALJ offered for rejecting *Dr. Schmitter's opinion regarding Plaintiff's need for breaks* as
20 reasons for finding that Dr. Hatzakis' opinions regarding Plaintiff's ability to sit, stand, walk, lift,
21 carry, and additional postural limitations were inconsistent with the longitudinal record. *See* Tr.
22 30 (citing exh. 22F3, Tr. 1756, and exh. 26F20, Tr. 2048, in rejecting Dr. Schmitter's opinion
23 regarding Plaintiff's need for breaks "at will"); *cf.* Dkt. 21 at 16. While those were indeed

1 reasons the ALJ gave in evaluating Dr. Schmitter’s opinion, they were not reasons proffered by
2 the ALJ in deeming Dr. Hatzakis’ opinions inconsistent with the longitudinal record, and the
3 Court “review[s] only the reasons provided by the ALJ in the disability determination and may
4 not affirm the ALJ on a ground upon which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630
5 (9th Cir. 2007).

6 Second, even if the Court considered the evidence cited by the Commissioner, the cited
7 records fail to support the ALJ’s consistency findings regarding Dr. Hatzakis’ opinions, and the
8 Commissioner has cherry-picked portions of the cited records, ignoring other less favorable
9 observations and notations. *See* Tr. 1756 (additionally noting that Plaintiff had a “slight
10 asymmetry at the end of stance phase,” that he “appear[ed] stiff and uncomfortable when he
11 would first rise from standing after sitting,” that he “ha[d] weakness” on the left leg, that he was
12 only able to do heel to toe walking on the right side but not the left, and that he caught his left toe
13 on the floor while leaving the exam room but did not fall); *see also* Tr. 2044-48 (Dr. Yan notes
14 in September 2019 that Plaintiff’s musculoskeletal system was “positive for back pain” and that
15 he had tenderness in his lower back and would continue with physical therapy).

16 Finally, the Court agrees the ALJ failed to adequately explain how the 2019 SIMP report
17 and opinion, which the ALJ itself discounted as “overly restrictive” in part, undermined the
18 consistency of Dr. Hatzakis’ opinions given the other record evidence documenting objective
19 abnormalities with Plaintiff’s back and hips. *See* Tr. 170-73, 604-05, 1614-16, 1751, 2027,
20 1732-40, 1748, 1750, 646, 1096, 1861, 3135, 1096, 3135-36, 2026-27, 2139-67, 2137-38, 1130.
21 The ALJ failed in any meaningful fashion to compare and/or contrast the October 2019 SIMP
22 opinion with Dr. Hatzakis’ opinion, and similarly failed to specify which of the many opined
23 limitations in the three opinions she found were inconsistent and why.

1 The ALJ's supportability and consistency findings regarding Dr. Hatzakis' opinions are,
2 therefore, not supported by substantial evidence; thus, remand is required for the ALJ to
3 reconsider Dr. Hatzakis' opinions.

4 **C. Lay Witness Testimony**

5 Plaintiff's mother, R.B., submitted a March 2019 third party function report on Plaintiff's
6 behalf in which she described how Plaintiff's physical impairments had limited his work and
7 other activities. Tr. 462-69. R.B. explained that she spent time with Plaintiff approximately
8 once per week, and that while he used to be a "very active" person, his impairments require him
9 to "pick and choose what he can do now." Tr. 466. She stated Plaintiff is unable to sit, stand, or
10 walk "very long," and that "doctors' orders" prevent him from lifting more than ten pounds. Tr.
11 462. R.B. noted Plaintiff was not generally a "complainer," but that his pain was now so intense
12 that it would bring him "to tears." Tr. 462. She noted Plaintiff is unable to sleep because of his
13 pain and muscle cramps. Tr. 463. Although Plaintiff still takes care of his own personal
14 hygiene, he is much slower than he used to be. Tr. 463. Additionally, Plaintiff no longer
15 performs any yard work. Tr. 465. Plaintiff often uses a cane for stability. Tr. 468.

16 The ALJ stated that pursuant to 20 C.F.R. § 404.1520c, she was no longer required to
17 articulate how she considered evidence from nonmedical sources like R.B. Tr. 24. Nevertheless,
18 the ALJ indicated she had considered R.B.'s statement to the extent that "it provided context
19 regarding some of the challenges faced by [Plaintiff] relative to coping with the chronic nature of
20 his impairments and maintaining his daily activity level." Tr. 24. While the ALJ did not
21 specifically evaluate R.B.'s testimony, the ALJ discounted it noting "the medical evidence. . . as
22 summarized herein. . . does not support such a [disability] finding." Tr. 24.

1 In cases filed after March 27, 2017, an ALJ is “not required to articulate” how he or she
2 evaluated evidence from non-medical sources such as educational personnel, public and private
3 social welfare agency personnel, and other lay witnesses. 20 C.F.R. § 404.1502(e). The Ninth
4 Circuit has not clarified whether, in post-March 27, 2017, cases, an ALJ must provide “germane”
5 reasons for rejecting lay witness testimony. *See, e.g., Muntz v. Kijakazi*, 2022 WL 17484332, at
6 *2 (9th Cir. Dec. 7, 2022) (applying “germane reasons” standard to ALJ’s evaluation of third-
7 party function report from claimant’s husband); *Weitman v. Kijakazi*, 2022 WL 17175060, at *4
8 n.4 (9th Cir. Nov. 23, 2022); *but see Fryer v. Kijakazi*, No. 21-36004, 2022 WL 17958630, at *3
9 (9th Cir. Dec. 27, 2022) (noting that “[i]t is an open question whether ALJs are still required to
10 consider lay witness evidence under the revised regulations, although it is clear they are no
11 longer required to articulate it in their decisions”).

12 The ALJ is required to determine RFC based upon all relevant evidence of record; this
13 includes observations made by a claimant’s family, neighbors, friends, or other persons. *See* 20
14 C.F.R. §§ 404.1545(a)(1), 404.1545(a)(3). That an ALJ can disregard or reject relevant lay
15 evidence for no reason is inconsistent with the Commissioner’s obligation to consider such
16 evidence, and the rule the ALJ must provide some rationale in order for the Court to
17 meaningfully determine whether the ALJ’s conclusions are free of legal error and supported by
18 substantial evidence. *See e.g., Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

19 Here, R.B.’s third party testimony is relevant evidence the ALJ considered and rejected
20 on the grounds the medical record does not support a disability finding. The Court has already
21 found the ALJ erred in rejecting Plaintiff’s testimony based upon this rationale, and that the ALJ
22 also misevaluated several medical opinions. The ALJ accordingly also erred in rejecting R.B.’s
23 testimony and shall reconsider R.B.’s testimony on remand.

1 **D. Remedy**

2 Plaintiff requests and the Court agrees the appropriate remedy in this case is remand for
3 further proceedings to resolve the outstanding conflicts in the evidence. *See Brown-Hunter v.*
4 *Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (discussing the three requirements that must be
5 satisfied for remand for an award of benefits).

6 **CONCLUSION**

7 For the foregoing reasons, the Commissioner's final decision is **REVERSED**, and this
8 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
9 405(g).

10 On remand, the ALJ shall reassess the medical opinions of the SIMP team's May and
11 October 2019 opinions, Dr. Schmitter's July 2021 opinion, and Dr. Hatzakis' 2020 and 2021
12 opinions; reassess Plaintiff's testimony and the lay witness testimony from his mother, R.B.;
13 develop the record and redetermine RFC as needed, and proceed to the remaining steps of the
14 disability determination process as appropriate.

15 DATED this 21st day of August, 2023.

16
17 
18 _____
BRIAN A. TSUCHIDA
United States Magistrate Judge